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NO. 00-1503

IN THE

Supreme Court of the United States

THE CITY OF GAINESVILLE, FLORIDA,
Petitioner,

v.

CANNABIS ACTION NETWORK, INC. AND KEVIN APLIN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, THE FLORIDA LEAGUE OF CITIES, INC., THE GEORGIA MUNICIPAL ASSOCIATION AND THE CITY OF ORLANDO, FLORIDA IN SUPPORT OF PETITIONER THE CITY OF GAINESVILLE, FLORIDA

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Brief of Amici Curiae
International Municipal Lawyers Association,
the Florida League of Cities, Inc.,
the Georgia Municipal Association and
the City of Orlando, Florida
in Support of Petitioner
the City of Gainesville, Florida

Amici curiae International Municipal Lawyers Association, the Florida League of Cities, Inc., the Georgia Municipal Association and the City of Orlando, Florida, file this brief in Support of Petitioner the City of Gainesville, Florida and have a compelling interest in the legal issues presented by this case.[1]

INTEREST OF AMICUS CURIAE

The International Municipal Lawyers Association ("IMLA") is a nonprofit, nonpartisan professional organization consisting of more than 1,400 members. The membership is comprised of local government entities, including cities and counties, and subdivisions thereof, as represented by their chief legal officers; state municipal leagues; and individual attorneys who represent municipalities, counties, and other local government entities. IMLA has provided services and educational programs to local governments and their attorneys since 1935. IMLA is

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[1] Pursuant to this Court's Rule 37.2(a), letters of consent from both parties to the filing of this brief have been filed with the Clerk. Pursuant to this Court's Rule 37.6, amici represent that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

the oldest and largest association of attorneys representing United States municipalities, counties, and special districts.

Since its establishment, IMLA has advocated for the rights and privileges of local governments, and the attorneys who represent them, through its Legal Advocacy Program. Specifically, the Legal Advocacy Program of IMLA serves the membership by advocating the nationwide interests, positions, and views of local governments on legal issues. IMLA has appeared as an amicus curiae on behalf of its members before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

IMLA's specific interest in this case stems from the impact that the Court of Appeals' ruling will have on local governments throughout the Eleventh Circuit, as well as potentially throughout the United States. IMLA, as an organization promoting legal issues on behalf of local governments, therefore, files this brief on behalf of its members nationwide.

The Florida League of Cities ("FLC") is a voluntary organization whose membership consists of municipalities and other units of local government rendering municipal services in the State of Florida. Its membership presently numbers some 400 municipalities and three charter counties. Under its Charter, the FLC's purpose is to work for the general improvement of municipal government and its efficient administration; and to represent its members before the various legislative, executive, and judicial branches of government on issues pertaining to the welfare of its members.

The Georgia Municipal Association ("GMA") is a nonprofit corporation created for the purpose of improving municipal government. Its membership is comprised of Georgia cities and towns which, by action of their governing bodies, elect to become members. GMA membership consists of 482 municipal corporations in which more than 99 percent of state's municipal citizens reside. The Association's purposes include "promotion of the general welfare of municipalities and urban areas of this State." GMA periodically files amicus briefs in cases such as the one at bar, which are of statewide interest and will have a substantial impact on the municipalities and the cities which GMA serves.

The City of Orlando is a municipality within the State of Florida and will be one of the cities which will need to comply with the Eleventh Circuit's decision if it remains unchanged.

SUMMARY OF THE ARGUMENT

The amici are interested in this case for its far-reaching implications in reference to permitting ordinances for activities such as parades, street closures, and the use of local government parks and other property. The requirement that local governments seek affirmative court approval for permit denials is extremely onerous and contrary to Supreme Court precedent, as well as contrary to the decision of other appellate courts. The theoretical effect in the Eleventh Circuit is that local governments immediately will have to spend significant personnel and other resources to obtain court permission each and every time a permit application is not approved exactly "as is." The practical effect is that,

many local governments, because of the significant required expenditure of resources under this decision, will rarely deny a permit application or grant the application with modifications. Rather, these governments will simply grant permit applications as requested for fear of lengthy court battles, much to the detriment of their communities at large.

Additionally, courts outside the Eleventh Circuit, at both the state and federal trial and appellate levels, are now forced to choose between the reasoning of the Eleventh Circuit and the reasoning of the First, Second, and Seventh Circuits when interpreting Supreme Court precedent while reviewing local government permitting schemes. Specifically, the Seventh Circuit has refused to analyze similar permitting schemes as prior restraints, while the Second and Seventh Circuits have applied limited prior restraints analysis.

Because of the important nature of this case, its departure from Supreme Court precedent, and the split in the circuits which has developed, amici urge that this Court grant the petition for certiorari.

ARGUMENT FOR GRANTING THE WRIT OF CERTIORARI

The amici file this brief in support of the City of Gainesville, Florida's petition for certiorari. The amici submit the Eleventh Circuit decided an important question of federal law in a way that conflicts with the decisions of this Court. The amici further submit the Eleventh Circuit entered a decision in conflict with the decisions of other United States Courts of Appeals on the same question of federal law. These

factors make this case one of exceptional importance and appropriate for review by this Court.

I. THE CITY OF GAINESVILLE, FLORIDA'S PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE THE ELEVENTH CIRCUIT'S DECISION MISAPPLIES *FREEDMAN v. MARYLAND*, AND OTHER SUPREME COURT DECISIONS, IN THE CONTEXT OF CONTENT-NEUTRAL TIME, PLACE, AND MANNER REGULATIONS.

The Eleventh Circuit's decision holds that a content-neutral permitting scheme which requires a permit to close a street for a demonstration must be reviewed under *Freedman v. Maryland*, 380 U.S. 51 (1965), and is unconstitutional unless the scheme complies with three procedural safeguards. The three safeguards required by *Freedman* are: 1) that upon the denial of the permit, the permitting authority must bear the burden of initiating judicial proceedings, as well as the burden of proof; 2) that any restraint prior to judicial determination can be only for a specified period of time during which the status quo is maintained; and 3) that there must be an assurance of a prompt judicial review. The Eleventh Circuit noted the Respondents conceded the Gainesville ordinance complies with the second safeguard. Pet. App. 24. The Court of Appeals implied that in non-business licensing schemes, prompt access to judicial review (the third requirement) required more than simple access to judicial review, though it declined to address the question directly. Pet. App. 26. Instead, the Court of Appeals found the Gainesville Street Closing Ordinance unconstitutional because, upon denial of a permit, it fails to place the burden

of seeking judicial review (the first requirement) on the City of Gainesville.[2] Amici respectfully submit this holding, as applied to content-neutral regulations, is based on a misapplication of *Freedman*, and goes far beyond the protection the *Freedman* court sought to establish. Further, the Court of Appeals holding is contrary to the precedents of this Court in reviewing content-neutral permitting schemes. For this reason, this Court should grant the petition for certiorari.

A. This Court's Precedents

In *Freedman*, this Court examined a Maryland motion picture *censorship* statute that required a theater submit films to a State Board of Censors and obtain a license before showing the film. The State Board conceded the film at issue did not violate statutory obscenity standards, and conceded further the film would have been granted a license had it been submitted for review. Nonetheless, the State Board contended the appellant was properly convicted for failing to submit the film to the State Board.

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[2] Interestingly, by requiring that the City seek judicial review, the Court of Appeals essentially answered the question it ostensibly reserved. If the City bears the burden of going to court, then logically, the requirement of "prompt judicial review" is not limited to mere *access*; rather, it requires a prompt judicial *determination*. To determine otherwise renders the affirmative requirement of *seeking* review meaningless, for surely a city would not be able to sit back and "twiddle its thumbs" awaiting a decision at some unknown time.

The appellant argued the statutory scheme constituted an invalid prior restraint because it presented the danger of "unduly suppressing" protected expression; that is, the scheme effectively *censored* protected speech. The *Freedman* court concurred, holding statutory *censorship* schemes, such as those presented by the Maryland statute, must satisfy the three requirements outlined above.

However, the Gainesville ordinance, like other local government street closure ordinances throughout the United States, should not be reviewed as a prior restraint. Some sixty years ago, in a very similar case, this Court reviewed an ordinance requiring a permit to demonstrate on a public street or sidewalk and upheld the ordinance as a valid time, place, and manner regulation. In *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941), this Court stated

> [t]he authority of a municipality to impose restrictions in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the street of cities is the most familiar illustration of this recognition of social need.

This Court upheld the *Cox* ordinance without reference to "prior restraint" analysis. As in *Cox*, ordinances like the one at issue here should not be viewed under the framework of *Freedman*, where a censor is engaged in censorship of expressive material. Rather, they should be viewed and

analyzed as content-neutral time, place, and manner regulations.

More recently, in *Hill v. Colorado*, 530 U.S.703 (2000), this Court upheld an statute that constituted an outright prohibition on speech near health care facilities. This Court did not review the ordinance in terms of prior restraint analysis and did not require that the government affirmatively go to court before being able to restrict the speech at issue. Surely an ordinance which seeks only to reasonably regulate city streets should not be treated more harshly than an actual ban on speech.

B. The Eleventh Circuit's Action

The Court of Appeals, however, likened the Gainesville ordinance to the *censorship* scheme in *Freedman*. It thus concluded its review of the ordinance must start with the original *Freedman* decision. Amici respectfully disagree and assert that, even without this Court's precedents mentioned above, the Gainesville ordinance cannot be considered a *censórship* scheme.

Black's Law Dictionary defines "*censor*" as "[o]ne who examines publications, films, and the like for objectionable content." Black's Law Dictionary 224 (6th Edition 1990). "*Censorship*" is defined as "[r]eview of publications, movies, plays, and the like for the purpose of prohibiting the publication, distribution, or production of material deemed objectionable as obscene, indecent, or immoral." Black's Law Dictionary 224 (6th Edition 1990). The City's ordinance, rather than *censoring* activities, provides that a street closing permit will be granted,

regardless of the content of the expression contemplated by the activity, provided that the activity will not, among other things, unreasonably interfere with vehicular or pedestrian traffic flow, will not cause an imminent danger or health hazard to any person, or will not damage public or private property. These factors for denying a permit do not mention, much less focus on, the content of the speech for which the street closure is sought. Because the ordinance is content neutral, it cannot be considered a *censorship* scheme.

Even under a prior restraint analysis, this Court has not required all three *Freedman* factors to be met in the context of content-neutral schemes. In *FW/PBS v. City of Dallas*, 493 U.S. 239 (1990), a case involving the licensing of a sexually oriented business, five members of this Court agreed that it was unnecessary for the permitting authority to bear the burden of initiating judicial proceedings when the permitting scheme is content neutral. (See Opinion of O'Connor, J. joined by Stevens & Kennedy, J.J., "In *Freedman*, the censor was *engaged in direct censorship of particular expressive material.* Under our First Amendment jurisprudence, such regulation of speech is presumptively invalid and, therefore, the censor in Freedman was required to carry the burden of going forward to court if the speech was to be suppressed . . . ." *FW/PBS*, 493 U.S. at 229 (emphasis added). See also, dissenting opinion of White, J. joined by Rehnquist, C.J., "I would offer that *Freedman* is inapplicable to the Dallas scheme." *FW/PBS,* 493 U.S. at 244.) Similarly, this content-neutral permitting scheme, if it is to be evaluated under prior restraint analysis, should not be required to meet all three procedural safeguards set forth in *Freedman*.

Because of the Eleventh Circuit's misapplication of this Court's precedents, amici respectfully request that the petition for certiorari be granted.

II. THE CITY OF GAINESVILLE, FLORIDA'S PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH OTHER UNITED STATES COURTS OF APPEALS' DECISIONS

The Eleventh Circuit's holding also is inconsistent with the holdings of other courts of appeals. Even if the Eleventh Circuit had not relied on a misapplication of Supreme Court precedent, its divergence from the reasoning of other courts of appeals warrants the granting of certiorari in this case.

Most recently, the Seventh Circuit, in *MacDonald v. City of Chicago*, 243 F.3d 1021 (7th Cir. 2001), upheld a city parade ordinance, concluding it was a valid time, place and manner regulation. The case notes the existence of an apparent conflict between *Cox* and *FW/PBS*, and suggests the difference in analysis lies in the unfettered discretion allowed governmental officials under *FW/PBS*. *MacDonald*, 243 F.3d at 1029-30 (citing *Graff v. City of Chicago*, 9 F.3d 1309, 1334-5 (7th Cir. 1993)). As in *MacDonald*, such discretion is missing in this case. The Seventh Circuit also noted Justice O'Connor's comment regarding *Freedman* that *there* the censor was engaged in direct censorship. *MacDonald* 243 F.3d at 1036. As in *MacDonald*, that is not the case here, or with the myriad of other local ordinances governing street closures. The court also noted the third factor in *Freedman* is

unworkable in the context of street closures. *MacDonald* 243 F.3d at 1036. Assume a city receives a request to close a street, but determines it should not grant this request because of the burden on the city infrastructure (clogged streets during rush hour, perhaps). Because the city would be forced to go to court in order to deny the street closure permit, it could be faced with new requests while it tried to resolve the first permit request. Uncertainty with respect to the first permit would prevent it from adequately addressing subsequent permits, requiring even further litigation. The cycle would then perpetuate itself *ad nauseam*.

In another Seventh Circuit case, decided less than a year ago, Judge Posner, joined by Judges Coffey and Easterbrook, also held permitting regulations which are required for demonstrations in city parks need not comply with *Freedman*. *Thomas v. Chicago Park District*, 227 F.3d 921 (7th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3530 (U.S. February 1, 2001) (No. 00-1249). In fact, the panel held such permitting schemes are not prior restraints at all.

In *Thomas*, the plaintiffs claimed because the regulations required permission to hold a rally in a public forum, the regulations imposed a "prior restraint" on the exercise of free speech. The court held that plaintiffs' characterization was "not helpful." *Thomas*, 227 F.3d at 923. The court noted the "historical referent of 'prior restraints' is censorship . . . which the administration of a park system does not much resemble." *Thomas*, 227 F.3d at 923-24, citing 4 William Blackstone, Commentaries on the Laws of England 151-153 (1769). The regulation challenged in *Thomas*, as here, did not authorize the permitting authority

to pass any judgment on the content of the speech or expression.

The plaintiffs in *Thomas*, as here, also argued that each time the park district denied a permit, it was required to seek judicial review. The court found this to be a misreading of *Freedman*, "which holds only that the government may not regulate the *content* of speech without judicial authorization and *so does not extend to time, place, and manner licensing systems*." *Thomas*, 227 F.3d at 926 (emphasis added). Similarly, the Gainesville ordinance, like the ordinances of local governments throughout the United States, does not regulate the *content* of speech. Rather, this ordinance and its other local government counterparts are legitimate time, place, and manner regulations.

Further, the court noted a park is a limited public space in that many demands are made of it, not all of which can be accommodated at all times for all purposes. The court went on to note competing interests cannot be weighed in the abstract, except in the grossest sense, and a court must pause before striking down a permit regulation on a facial challenge. *Thomas*, 227 F.3d at 924 (citations omitted).

Even if content-neutral time, place and manner ordinances were to be reviewed as prior restraints under the *Freedman* standard, only the first two safeguards are essential. Several other courts of appeals have recognized this. The Second Circuit in *Beal v. Stern*, 184 F.3d 117 (2nd Cir. 1999), held content-neutral regulations need only comply with two of the *Freedman* factors: the requirement that a decision be made within a specified and reasonable

time period, and the assurance that a prompt and final judicial review will be available.

The facts of the *Beal* case are strikingly similar to those in this case. In *Beal*, the plaintiffs sued because they were denied a permit to allow to hold a rally in New York's Washington Square Park. The district court held the permit requirement was content neutral and not a prior restraint, but rather, a reasonable time, place and manner restriction. The Second Circuit, while finding the regulations to be a prior restraint, relied on *FW/PBS* in holding content-neutral regulations need not comply with *Freedman*'s requirement that the permitting authority bear the burden of initiating judicial proceedings upon the denial of a permit.

Similarly, the First Circuit held a prior restraint system is permissible if it contains certain safeguards. *Jews for Jesus, Inc. v. Massachusetts Bay Transportation Authority*, 984 F.2d 1319 (1st Cir. 1993). Relying on *FW/PBS*, the court held content-neutral regulations must only limit the time for issuing authorizations and must allow for prompt judicial review. *Jews for Jesus, Inc.*, 984 F.2d at 1327.

As the above cases show, in addition to the Eleventh Circuit's divergent legal reasoning, the decision has dangerous policy implications for local governments. The decision will severely hinder local governments' ability to effectively regulate their streets. Requiring local governments to affirmatively engage in judicial proceedings every time they deny a permit to use a public forum will require that local governments devote significant manpower

and financial resources to filing actions in state or federal courts.

While amici recognize that public streets are quintessential public fora, amici submit local governments do not lose all ability to regulate these fora because of their "quintessential" nature. Public streets are also vital to the orderly transport of people and goods, and this dual purpose must be recognized. Local governments must be able to control the use of streets so that both purposes can be accommodated. In today's society, where we are continuously bombarded by reports of overcrowded streets and vehicular congestion, local governments must be able to freely plan the appropriate time to close streets for public demonstrations.

As a result of the Eleventh Circuit's decision, the courts will be turned into ad hoc permitting authorities, determining who can march when and where. Local governments will be forced to relinquish control of their public spaces to the whims of every person or organization seeking to use those spaces, at any time and for any circumstance. Under the Eleventh Circuit's rationale, local governments have lost all control over these fora.

CONCLUSION

For the foregoing reasons, amici join the City of Gainesville in its request that the Court grant the petition for certiorari in the above referenced case.

Respectfully submitted,

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